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No. 89-1641

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ELIZABETH H. DOLE, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW
COMMISSION and CF&I STEEL CORPORATION,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit

BRIEF OF AMERICAN IRON AND STEEL INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF AMERICAN IRON AND STEEL INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

The American Iron and Steel Institute ("AISI") respectfully files this brief as *amicus curiae* in support of Respondents. Written consents have been obtained from counsel for Petitioner and Respondents pursuant to Supreme Court Rule 37.3. The letters reflecting consent have been filed with the clerk's office.

INTEREST OF *AMICUS CURIAE*

The American Iron and Steel Institute is a national trade association whose 40 domestic member companies account for approximately 80 percent of the raw steel production of the United States. The issue presented by

this case is relevant to issues commonly encountered by AISI's member companies. AISI's member companies have a strong interest in the interpretation and enforcement of regulations governing coke production, such as those at issue in this case, because coke production is important to the manufacture of iron and steel. AISI was a party to the development of and the initial challenge to the coke oven emissions standards that were the basis of the citation issued by Petitioner the Secretary of Labor (the "Secretary") to Respondent CF&I Steel Corporation. *See American Iron and Steel Inst. v. Occupational Safety and Health Admin.*, 577 F.2d 825 (3d Cir. 1978).

SUMMARY OF ARGUMENT

Properly formulated, the question facing this Court is whether the United States Court of Appeals for the Tenth Circuit utilized the appropriate standard of review in its review of the decision of the Occupational Safety and Health Review Commission (the "Commission"). The answer to that question is yes.

The Commission is an autonomous independent adjudicatory board that is neither subordinate to the Secretary nor obligated to defer to the Secretary's interpretation of her regulations under the Occupational Safety and Health Act. The Commission is, therefore, fundamentally different from any of the boards created by Congress under other statutory schemes that the Solicitor General claims to be analogous.

Moreover, the independence the Commission enjoys from the Secretary was a conscious legislative choice to break a political deadlock that existed between labor and management over passage of the Occupational Safety and Health Act. The Commission's role in the statutory scheme is far more substantial than a mere finder of fact as the Secretary would have it. This Court should not destroy the political balance struck by Congress; rather, it should enforce the legislative compromise.

Congress intended that the decisions of the Commission be reviewed under the narrow "arbitrary and capricious" standard of the Administrative Procedure Act. Consistent with this standard, the Tenth Circuit properly held that the Commission's decision was reasonable.

The Tenth Circuit also appropriately deferred to the specialized expertise of the Commission in matters of occupational safety and health. The Commission is due the same level of deferential review granted to other specialized tribunals, such as the United States Tax Court.

Finally, since the Commission only decided that the Secretary had charged Respondent under the improper regulatory provision and not that no violation had occurred, upholding the Tenth Circuit would not, as the Solicitor General suggests, sanction the activity which brought about the charge in the first place.

ARGUMENT

UNDER THE APPROPRIATE STANDARD OF REVIEW, THE TENTH CIRCUIT PROPERLY UPHELD THE COMMISSION'S DECISION

Petitioner's arguments can be distilled into a simple syllogism: The Secretary is the policy-making authority under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("OSH Act"); the Commission has only adjudicatory authority. When the policymaker disagrees with an adjudicatory body over the interpretation of a regulation, the policymaker's interpretation must prevail. Therefore, in this case the Secretary's interpretation is entitled to judicial deference, and the Tenth Circuit erred in according deference to the Commission's interpretation. Petitioner's reasoning is simple enough, but

it does not accurately portray existing law [1] nor properly state the issue before this Court.[2]

The proper issue is the appropriate standard of review to be used by a court of appeals reviewing a decision of an independent, specialized adjudicatory tribunal—in this case, the Commission. In deciding that question, this

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[1] *Potomac Elec. Power Co. v. Director, Office of Workers' Compensation Programs* ("*Pepco*"), 449 U.S. 268 (1980), relied on by the Solicitor General, does not support the broad proposition for which the Solictor General cites it. *Pepco*, and the cases cited therein, involved appeals from a nonindependent adjudicatory tribunal that is fundamentally different in makeup from the Commission. Other cases supporting deference to the policymaker relied on by the Solicitor General involved direct appeals from an agency or department to a court. Different issues are involved when the statute has interposed an autonomous expert tribunal between the policymaker and the courts.

[2] Implicit in Petitioner's formulation of the question presented is the assertion that, where the Secretary and Commission disagree, the proper role of the Court is to review directly the reasonableness of the Secretary's actions. Such a position flatly contradicts the plain language of the OSH Act, which provides that persons, including the Secretary, may obtain review only of a "final order of the Commission." 29 U.S.C. § 660(a), (b). In other words, at issue is not the Secretary's view but the Commission's decision. Were it otherwise, the Commission would be only a fact-finding body with authority similar to an administrative law judge. There is nothing in the legislative history to support this result, even though it is inherent in the Solicitor General's formulation of the issue.

The Federal Mine Safety and Health Act of 1977, upon which Petitioner relies, is unlike the OSH Act in this regard because its legislative history explicitly provides that "the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and *the courts*." S. Rep. No. 181, 95th Cong., 1st Sess. 49 (1977), *reprinted in* 1977 U.S. Code Cong. & Admin. News 3401, 3448 (emphasis added). This admonition suggests that the Secretary's actions under the Federal Mine Safety and Health Act may be directly reviewed by courts; there is no similar suggestion in the OSH Act.

Court should consider the makeup of the adjudicatory body, any specific direction given that body by Congress, and the role of the adjudicatory body in the overall statutory scheme.

A. The Commission Is An Autonomous Adjudicative Tribunal That Is Neither Subordinate to the Secretary Nor Obligated to Defer to the Secretary's Interpretation of Her Regulations

Central to Petitioner's argument is the assertion that in cases of conflict between adjudicatory bodies and policymakers, courts must always defer to policymakers. Petitioner seems to equate all specialized adjudicatory bodies. She fails to recognize that substantial differences exist between nonindependent adjudicatory tribunals bound to and responsible to an agency head and specialized adjudicatory tribunals that exercise authority independent of agency influence.

In the case of nonindependent tribunals, the scope of judicial review is clear. To pick an example raised by Petitioner, the Longshore and Harbor Workers' Compensation Act (the "LHWC Act") establishes a Benefits Review Board ("Benefits Review Board") which is composed of members who are appointed by the Secretary for no fixed term and who serve at her pleasure. 33 U.S.C. § 921(b); *Kalaris v. Donovan*, 697 F.2d 376, 397 (D.C. Cir.), *cert. denied*, 462 U.S. 1119 (1983). The Benefits Review Board has no authority to promulgate any internal rules, to order deposition testimony, or to subpoena records and has no investigatory or contempt power. *See* 33 U.S.C. § 921 (establishing authority of Benefits Review Board). Thus, the Benefits Review Board is but an appendage of the Secretary. Indeed, it has been characterized as a quasi-judicial body of "lesser dignity." *Kalaris*, 697 F.2d at 396 n.82. The decisions of tribunals such as the Benefits Review Board are therefore properly accorded no special deference by the courts.

Saginaw Mining Co. v. Mazzulli, 818 F.2d 1278, 1283 (6th Cir. 1987); *see also Director, Office of Workers' Compensation Programs v. General Dynamics Corp.*, 900 F.2d 506, 510 (2d Cir. 1990).

In contrast, the Commission is composed of members who are appointed by the President, with the advice and consent of the Senate, for a fixed term and are removable by the President only "for inefficiency, neglect of duty, or malfeasance in office." 29 U.S.C. § 661(a), (b). Unlike the Benefits Review Board, the Commission is authorized to promulgate its own internal rules, to order deposition testimony, and to subpoena records, and has certain investigatory and contempt powers. *Compare* 29 U.S.C. § 661(g)-(i) *with* 33 U.S.C. § 921. Thus, in its makeup and authority, the Commission is more like the United States Tax Court ("Tax Court"), the Federal Mine Safety and Health Review Commission ("Mine Safety Commission"), and other specialized independent tribuals that play a significant policy role apart from individual departmental or agency heads. *See* 26 U.S.C. § 7443(b), (e), (f); 30 U.S.C. § 823(a), (b).

However, unlike either the Mine Safety Commission or the Tax Court, which have been instructed by Congress to defer to the head of the administrative agency whose decision they are reviewing,[3] the Commission is, in the words of its sponsor, Senator Javits, "an autonomous, independent commission which, without regard to

[3] In the legislative history of the Federal Mine Safety and Health Act, Congress unambiguously stated that "the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts." S. Rep. No. 181, 95th Cong., 1st Sess. 49 (1977), *reprinted in* 1977 U.S. Code Cong. & Admin. News 3401, 3448. Under the Internal Revenue Code, the taxpayer has the burden of proving the invalidity of the Internal Revenue Service Commissioner's determination of tax deficiency, which is presumptively correct. Tax Court Rule 142, 26 U.S.C. foll. § 7453 (1989). *Welch v. Helvering*, 290 U.S. 111, 115 (1933); *Merryman v. Commissioner*, 873 F.2d 879, 882 (5th Cir. 1989).

the Secretary, can find for or against him on the basis of individual complaints." *See Legislative History of the Occupational Safety and Health Act of 1970*, Senate Committee on Labor and Public Welfare (1971) ("Legislative History") at 463.[4]

In contrast, nothing in the OSH Act or its legislative history suggests that the Commission is to accord deference to the Secretary or treat the Secretary's actions as presumptively correct. Indeed, as courts have held under the OSH Act, the Secretary has the burden of proving all elements of an alleged OSH Act violation, which suggests that the Commission owes no deference to the Secretary. *See, e.g., B&B Insulation, Inc. v. Occupational Safety and Health Review Comm'n*, 583 F.2d 1364, 1372 (5th Cir. 1978); *Brennan v. Occupational Safety and Health Review Comm'n*, 511 F.2d 1139, 1143 (9th Cir. 1975).[5]

[4] *See also* Legislative History at 462 (Commission is "[a]utonomous and independent" and "is expressly set forth to be an independent commission") (statement of Sen. Javits); *id.* at 463 (Commission "would not be a Labor Department instrument") (statement of Sen. Javits); *id.* at 473 ("an independent enforcement agency . . . will be much more acceptable to employers, and . . . in the long run to employees" than a system under which the Secretary has adjudicatory authority) (statement of Sen. Holland); *id.* at 1143 (Commission is "an independent adjudicatory body") (letter from J.H. Hodgson, Secretary of Labor, to Sen. Javits (Dec. 15, 1970)).

[5] Although the Commission's rules of procedure were amended in 1986 to eliminate the specific regulatory provision placing the burden of proof on the Secretary, the Commission stated that "Commission case law on burdens of proof is in no way affected by the deletion of present § 2200.73 . . . parties . . . may continue to be guided by that case law." 51 Fed. Reg. 32,002, 32,013 (1986).

The Secretary did not argue in her appeal to the Tenth Circuit that the Commission erred in not deferring to her interpretation nor has the Solicitor General pressed that argument before this Court. The Secretary has focused only on the deference owed her by the courts, not the deference, if any, owed her by the Commission. This position contrasts with the position taken in cases relied on by the Solicitor General involving the Benefits Review Board in which courts have held that the Board did not give defer-

B. The Tenth Circuit's Scope of Review Was Properly Limited to Determining the Reasonableness of the Commission's Interpretation

The OSH Act does not set forth the standard of judicial review of Commission decisions. Given the absence of any specific congressional direction, AISI believes that the Commission's final decision should be subject to the standard of review of final agency action governed by the Administrative Procedure Act ("APA").[6] 5 U.S.C. § 706. That was the standard the Commission's sponsor stated would govern Commission decisions. According to Senator Javits, "[t]he Administratice Procedure Act applies anyway, whether the Secretary is the enforcing agent or the Commission is the enforcing agent." Legislative History at 463. Under the APA standard, courts must uphold agency action unless it is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706. Numerous appellate courts have subscribed to precisely this standard in reviewing Commission decisions. *E.g., Fluor Constructors, Inc. v. Occupational Safety and Health Review Comm'n*, 861 F.2d 936, 939 (6th Cir. 1988); *accord Brock v. Bechtel Power Corp.*, 803 F.2d 999, 1000 (9th Cir. 1986); *Donovan v. Anheuser-Busch, Inc.*, 666 F.2d 315, 324-25 (8th Cir. 1981); *Marshall v. Cities Serv. Oil Co.*, 577 F.2d 126, 130 (10th Cir. 1978); *see also Marshall v. Western Elec. Inc.*, 565 F.2d 240, 244 (2d Cir. 1977) (reviewing court's "role 'is to decide whether the Commission's interpretation of the regulation is unreasonable and inconsistent with its purpose, the normal standard for review of the interpretation of a regulation by the agency charged with its administration'") (*quoting Brennan v. Occupational Safety and Health Review Comm'n*, 491 F.2d 1340, 1344 (2d Cir. 1974)).[7] By definition, the "arbitrary and capricious" standard of review is a narrow one, and the reviewing court may consider only whether the Commission's decision was based on a consideration of all relevant factors and whether the Commission made a clear error of judgment. *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974).

The Tenth Circuit properly limited its review to examining whether the Commission's interpretation of the coke oven respiratory regulation was reasonable. Pet. App. 9a-11a.[8] Circumscribed as it was by the narrow scope of review mandated by the APA, the Tenth Circuit was correct to limit its inquiry to the reasonableness of the Commission's interpretation without ruling on the reasonableness of the Secretary's interpretation, to which the Commission is not obligated to defer.[9]

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ence to the Secretary as required by the legislative history of the LHWC Act. *See Secretary of Labor v. Cannelton Indus., Inc.*, 867 F.2d 1432 (D.C. Cir. 1989); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533 (D.C. Cir. 1986).

[6] Another possible standard, raised in passing by the First Circuit, would be *de novo* review with "the court mak[ing] up its mind independently about the rule's meaning," *Donovan v. A. Amorello & Sons, Inc.*, 761 F.2d 61, 63 (1st Cir. 1985). Neither the First Circuit, nor any other court, has seriously considered such a course of action, which would overturn generally accepted principles of administrative law. *See, e.g., Federal Labor Relations Auth. v. U.S. Dep't of the Treasury*, 884 F.2d 1446, 1454 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 863 (1990); *Acadian Gas Pipeline Sys. v. Federal Energy Regulatory Comm'n*, 878 F.2d 865, 868 (5th Cir. 1989).

[7] In *Brock v. Chicago Zoological Soc'y*, 820 F.2d 909 (7th Cir. 1987); *United Steelworkers v. Schuylkill Metals Corp.*, 828 F.2d 314 (5th Cir. 1987); and *Brock v. Williams Enterprises of Ga., Inc.*, 832 F.2d 567 (11th Cir. 1987), relied upon by the Solicitor General, the Seventh, Fifth, and Eleventh Circuits did not address the appropriate scope of review of Commission decisions.

[8] References to "Pet. App." refer to the appendix to the Petition for a Writ of Certiorari filed by the Solicitor General in this Court on April 2, 1990.

[9] Although the Tenth Circuit stated that "it is certainly possible to reach an alternate interpretation of the ambiguous regulatory

C. The Tenth Circuit Appropriately Deferred to the Expertise of the Commission

Given the Commission's expertise in occupational safety and health issues, it was also appropriate for the Tenth Circuit to defer to the Commission's reasonable interpretation of the regulation. Deference is routinely accorded by appeals courts to the decisions of specialized independent tribunals that resemble the Commission, and such treatment is appropriate in the case at hand.

The Tax Court, for example, whose similarities to the Commission have been discussed above, has long been recognized by courts to possess a special competence that warrants appellate deference to its decisions.[10] Thus in *Dobson v. Commissioner*, 320 U.S. 489 (1943), this Court noted that the Tax Court "deals with a subject that is highly specialized and so complex as to be the despair of judges" and, consequently, "[i]n deciding law questions courts may properly attach weight to the decision of points of law by an administrative body having special competence to deal with the subject matter."[11] *Id.* at 498, 502.

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language," Pet. App. at 11a, the Court did not rule that the Secretary's interpretation was such an "alternate interpretation" or that it was otherwise reasonable.

[10] The Solicitor General may argue that the Tax Court is not in the same position as the Commission because the Commissioner of Internal Revenue has not been granted the broad policy-making authority given the Secretary. Although the Internal Revenue Code is far more detailed than the OSH Act, certain provisions give the Commissioner broad policy-making authority, *e.g.*, 26 U.S.C. §§ 482, 1502. Furthermore, as a practical matter, the very complexity of the Code gives the Commissioner substantial policy-making authority in his administration of the statute. *See id.* § 7805(a).

[11] Although the 1948 amendments to the Internal Revenue Code authorizing appellate courts to conduct "clearly erroneous" review of Tax Court factual findings overruled any suggestion in *Dobson* that factual findings of the Tax Court be given greater weight than those of ordinary district courts, *see* 26 U.S.C. § 7482(a); *Commissioner v. Duberstein*, 363 U.S. 278, 289 n.11, 291 n.13 (1960), "the statute does not profess to affect that portion of *Dobson* which discusses appellate review of questions of law." *ABKCO Industries, Inc. v. Commissioner*, 482 F.2d 150, 156 n.3 (3d Cir. 1973). Consequently, appellate courts continue to accord deference to Tax Court decisions. *E.g.*, *Magnuson v. Commissioner*, 753 F.2d 1490 (9th Cir. 1985).

Following the lead of *Dobson*, federal courts of appeals have often recognized the "special competence" of the Tax Court and accorded deference to the decisions of that tribunal. *See, e.g.*, *Estate of Simmie v. Commissioner*, 632 F.2d 93, 94 (9th Cir. 1980) ("Opinions of the Tax Court reflect 'that degree of special expertise which Congress has intended to provide in that tribunal' . . . . Therefore, we 'should not overrule that body, unless some unmistakable question of law mandates such a decision.'") (*quoting Sibla v. Commissioner*, 611 F.2d 1260, 1262 (9th Cir. 1980)); *accord Nickell v. Commissioner*, 831 F.2d 1265, 1269 (6th Cir. 1987); *Bradley v. Commissioner*, 324 F.2d 610, 612 (4th Cir. 1963).[12] *But see Vukasovich, Inc. v. Commissioner*, 790 F.2d 1409, 1413 (9th Cir. 1986) ("general rule of special deference to the Tax Court is inappropriate although its judgments in its field of expertise are always accorded a presumption that they correctly apply the law").[13]

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[12] *See also Guy F. Atkinson Co. v. Commissioner*, 814 F.2d 1388, 1391 (9th Cir. 1987) ("Tax Court's opinions bearing on the Internal Revenue Code are entitled to deference because of its special expertise in the field."), *cert. denied*, 485 U.S. 970 (1988); *Magnuson v. Commissioner*, 753 F.2d at 1493 (same); *ABKCO Indus.*, 482 F.2d at 155 (recognizing "that the Tax Court's resolutions of questions of law are persuasive and that it is desirable for the reviewing court to have the benefit of the Tax Court's expertise").

[13] It is also noteworthy that all of the practical reasons advanced by Petitioner in support of her argument that she is due deference would apply to the Commissioner of Internal Revenue with the possible exception of direct access to the federal courts. The Commissioner does not have direct access to courts but must

Similar to their treatment of Tax Court decisions, courts have also accorded deference to determinations of the Commission. *See, e.g., Bechtel Power Corp.*, 803 F.2d at 1000 ("[W]e will defer to the Commission's expertise in exercising the independent adjudicatory function assigned it by the Act because 'it is the Commission and not the Secretary which is charged with the final administrative adjudication of the Act.'") (*quoting Brennan v. Occupational Safety and Health Review Comm'n*, 513 F.2d 713, 715-716 (8th Cir. 1975)); *Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1332, 1334 n.10 (6th Cir. 1978) (Commission entitled to great deference in its reasonable interpretation of OSH Act regulations; that deference "is founded primarily on the special expertise" of the Commission).[14]

D. Deference to the Commission Maintains the Political Balance Between Business and Labor Interests Struck by the OSH Act

In reviewing the decision below, this Court should take into consideration the role of the Commission in the overall statutory scheme. The Commission was established to resolve what Senator Javits characterized as "the most bitter labor-management political dispute in years."

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proceed through the Secretary of the Treasury (*see, e.g.*, 26 U.S.C. §§ 7401-7410); this, however, is a distinction without practical significance.

[14] *See also Marshall v. Cities Serv. Oil Co.*, 577 F.2d at 130 (expertise of Commission is presumed in matters of job safety and "Commission's interpretations regarding the meaning of the Act should be given substantial deference by a court") (*quoting Brennan v. Occupational Safety and Health Review Comm'n*, 501 F.2d 1196, 1199 (7th Cir. 1974)); *Duslop v. Rockwell Int'l*, 540 F.2d 1283, 1289 (6th Cir. 1976) (court owes Commission's interpretation of the OSH Act great deference because Commission members are appointed by the President by virtue of specialized training, education or experience and are empowered to perform the final administrative adjudication under the Act). *But see* cases cited at n.7, *supra*.

Legislative History at 193. The bill that had been reported out of the Senate Committee on Labor and Public Welfare was viewed as largely pro-labor. Faced with the prospect that the bill would not be passed at all, the Senate accepted Senator Javits' proposal as a means of sssuring a fair and independent method of furthering the purposes of the OSH Act. As Representative Scherle stated:

> The true goal of any occupational safety and health legislation can be simply stated. It is to foster improved standards of safety and health for workers, and to do it in a way that is both reasonable and fair.

Legislative History at 1014.[15] The need for fairness that was identified by Representative Scherle was a prime

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[15] The committee bill to which Representative Scherle objected did not provide for an independent adjudicatory commission. This was one of the prime faults that the Representative identified with the bill. Instead, the committee bill "follow[ed] the oversimplified approach of placing all functions in the Secretary of Labor." *Id.* While labor unions supported this scheme, it was roundly criticized by employers. As Senators Dominick and Smith noted in their dissent in the Committee Report, "the bill is opposed by the Administration, employers, State occupational health and safety agencies, and by national standards producing organizations while its primary support comes from the leadership of large unions." Legislative History at 200. These Senators objected to the fact that the Committee's bill settled "[a]ll functions, including standard setting, investigation, prosecution, adjudication, and review" in the Secretary of Labor. *Id.*

In contrast, Senator Javits' amendment, which was added on the floor of the Senate, established the Commission, which Representative Scherle described as "an independent presidentially appointed . . . Commission whose function would be to conduct hearings on alleged violations discovered by the Secretary and . . . [to] issue any necessary corrective orders, as well as assess civil penalties." Legislative History at 1014-15. The Javits amendment was designed to reassure business. "Where we can give [business] a measure of reassurance . . . by so simple a means as an autonomous enforcement board . . . I see no reason why we should not do it." Legislative History at 470 (statement of Senator Javits).

motivating factor behind the Javits amendment. The notion that an independent Commission would be fair to both labor and business interests prompted Senator Javits' amendment. To adopt the Secretary's position in this case would be to reduce the Commission's function to that of a fact finder and remove the keystone to winning business acquiescence to the OSH Act.

As the Seventh Circuit has reminded us, when a legislative provision is the result of a compromise, it is not the function of a court to undo the political balance which has been reached:

> [W]here a statute strikes a political balance but administration of the statute is entrusted to an agency that may not embody that balance, it is dangerous to defer automatically to the agency's view. An agency that may be dominated by one faction in the legislative struggle that led to enactment of a compromise is not authorized to hand that faction a victory that was denied it in the legislative arena through the efforts of another faction. The court must enforce the compromise, not the maximum position of one of the interest groups among which the compromise was struck.

Bethlehem Steel Corp. v. EPA, 723 F.2d 1303, 1309 (7th Cir. 1983).

E. This Court's Decision Does Note Relate to Any Liability of Respondent

Finally, the Solicitor General suggests that to uphold the Court of Appeals would permit Respondent to escape liability, although it had been explicitly warned and had violated the Act. Brief for Petitioner at 37. The Commission, however, did not suggest that Respondent's failure to provide properly fitting respirators did not violate the Act. All it held was that the Secretary had charged Respondent under the wrong provision of the Regulations. *See* Pet. App. at 40a-44a. This is precisely what

one would expect from a commission established to provide "an *effective* and *fair* method of enforcement," of the OSH Act. Legislative History at 880 (emphasis in original).[16]

The Tenth Circuit was therefore correct to uphold the Commission's decision.

CONCLUSION

The Tenth Circuit exercised appropriate judicial review over the Commission's order and, accordingly, its decision should be affirmed.

Respectfully submitted,

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[16] The Commission's job is to reach the proper result, not to reach the result advocated by one of the parties simply because of who that party is. *See General Dynamics*, 900 F.2d at 510 (deference to agency head in role of litigant would deprive claimants of impartial review).